Slay Transportation Company, Inc. and Industrial Marketing, Inc., *and* Teamsters Local Union 988 affiliated with the International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 16–RC–10044

August 25, 2000

DECISION ON REVIEW AND ORDER REMANDING

BY MEMBERS FOX, LIEBMAN, AND BRAME

On July 21, 1998, the Regional Director for Region 16 issued a Decision and Direction of Election in the above-entitled proceeding, in which the Petitioner seeks to represent a unit of approximately 56 truckdrivers, tank washers, and mechanics employed by the Employer at its Houston, Texas facility.

The Employer contends that approximately 71 owner-operator truckdrivers also must be included in the unit because they are statutory employees who are encompassed by the driver classification. The Regional Director found, inter alia, that the owner-operators are independent contractors, and not employees within the meaning of Section 2(3) of the Act. He therefore excluded them from the unit.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending, inter alia, that the Regional Director erred by excluding owner-operators from the unit. On August 19, 1998, the Board granted the request for review solely with respect to the Regional Director's finding that the owner-operators are independent contractors. In all other respects, the request for review was denied.[1] The election was conducted as scheduled on August 20, 1998, and the ballots were impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record in this case with respect to the issue on review, we conclude, in agreement with the Employer, that the Employer's owner-operators are employees within the meaning of Section 2(3) of the Act.

I. FACTS

The Employer transports hazardous and nonhazardous chemicals in liquid and dry bulk form. Charles King, manager of terminal operations at the Houston facility, is responsible for transportation, maintenance, and tank-cleaning operations. King oversees the drivers, mechanics, and tank cleaners who perform those functions. Approximately 109 drivers are employed at the Houston terminal, including 38 "company" drivers (who drive company-furnished tractors) and 71 owner-operators (who own and operate tractors that they lease to the Employer). All drivers—both company drivers and owner-operators—are hired by King or by Regional Safety Manager Shelby Startz. King is responsible for the enforcement of the Employer's policies and procedures, and any problems with pay or required paperwork are reported to him.

The Employer provides all of the trailers used by both company drivers and owner-operators, and is responsible for the repair, maintenance, and operating costs of that equipment. The Employer, however, has no ownership interest in the tractors driven by owner-operators. Rather, it leases these tractors from the owner-operators pursuant to individual contract lease agreements that specify the particular tractor that will be leased. The Employer is not responsible for the maintenance, repair, fuel, licensing, or operating expenses of these tractors.

All drivers are offered over-the-road, regional, and local jobs. There are a variety of pay arrangements for the drivers, depending on the type of run. Company drivers are paid hourly for some local runs, by the load on other runs, and by the mile on over-the-road runs. Owner-operators generally are paid on the same basis as company drivers for similar runs. Company drivers receive vacation, sick pay, medical benefits, and employer-issued gas cards. Owner-operators do not receive these benefits.

Owner-operators receive separate payments from the Employer for the rental or lease of their tractors. There is no evidence that owner-operators may negotiate pay rates different from those received by company drivers for similar jobs. Owner-operators are prohibited from subcontracting; however, they may hire other drivers to operate their tractors, subject to the approval of the Employer. The owner-operators negotiate and pay the wages of any driver they hire, and they are responsible for making the appropriate tax and insurance deductions for those drivers. There is no evidence that owner-operators are prohibited from working for other employers; however, the testimony indicates that none currently do so.

All drivers, including those hired by owner-operators to operate their tractors, are required to pass a physical examination, and are subject to the same drug-testing program. All drivers must attend a training or orientation period conducted primarily by Startz, and all are given the Employer's employee manual, which is reviewed in detail with them during their orientation period. All drivers are trained on the proper procedures for safely handling the products they transport and for using the Employer-provided personal protective equipment. All must successfully complete written tests covering material contained in a series of training videos. All new drivers are then assigned for up to 2 weeks to an experienced driver who knows the customers and products.[2] Company drivers and owner-operators are subject to the same discipli-

[1] Member Brame, dissenting, would have denied the request for review in its entirety.

[2] It is not clear from the record whether new drivers are assigned to owner-operators as well as to company drivers for these on-the-job-training periods.

nary standards and procedures, and are held to the same performance, safety, and attendance standards.

All leased equipment must display the Employer's logo. Although drivers are not required to wear company uniforms, the Employer will provide them if requested. All drivers report to the same dispatcher. Drivers may refuse job assignments, but if any driver declines a load or a run, that driver goes to the bottom of the job assignment board. If no driver voluntarily accepts a load or a run, the dispatcher can "force" a driver to accept the load. There is no evidence that any driver is penalized or disciplined for refusing assignments. All paperwork must be completed and returned to the dispatcher before a driver is paid, and logbooks, which are audited for compliance, must be maintained as directed by the Employer.

Neither owner-operators nor company drivers are authorized to extend credit to customers. Both groups are eligible for year-end awards, e.g., "driver of the year."

II. THE REGIONAL DIRECTOR'S FINDINGS

The Regional Director found that the owner-operators are independent contractors, and not employees as defined in the Act. The Regional Director found that the owner-operators possess certain entrepreneurial opportunities, as demonstrated by their ability to hire other drivers and the Employer's lack of control over that employment relationship. The Regional Director further found that the owner-operators have the opportunity to control their costs and enhance their income, depending on the employment arrangements they negotiate with the drivers they hire to operate their tractors. Although the drivers hired by the owner-operators are subject to approval by the Employer, the owner-operators pay their drivers directly and pay all appropriate Federal and State taxes. Further, the Regional Director found no evidence that the Employer is able to discipline or has disciplined any of the drivers hired by owner-operators.

The Regional Director noted that the Employer neither owns nor has financed any of the tractors it leases from the owner-operators. The Regional Director also noted that the Employer is not responsible for maintaining any necessary insurance coverage on those tractors or for complying with Federal licensing requirements for their operation. Based on the foregoing, the Regional Director concluded that the owner-operator drivers are independent contractors and excluded them from the unit found appropriate for collective bargaining.

III. ANALYSIS

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." In a decision issued subsequent to the Regional Director's consideration of the instant case, the Board reaffirmed that the common-law agency analysis is the proper test to be used in determining whether an individual is an employee or an independent contractor, and clarified the parameters of that analysis. *Roadway Package System, Inc.*, 326 NLRB 842 (1998). See also, *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).

The Supreme Court has held that "[T]he obvious purpose of [the Taft-Hartley Act] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."[3] In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the Court highlighted the importance of the multifactor analysis of the Restatement (Second) of Agency, Section 220, pp. 485–486 (1958).[4] In *Roadway*, the Board rejected the argument that the predominant factor in this analysis is whether an employer has a "right to control" the manner and means of the work performed by the individual whose status is at issue. The Board cautioned that the Restatement factors are not exclusive or exhaustive, and that, in applying the common-law agency test, it will consider "*all* the incidents of the individual's relationship to the employing entity." *Roadway*, supra at 850 (emphasis added). See also, *Dial-A-Mattress*, supra at 892.

Applying the foregoing to the facts of this case, we conclude, contrary to the Regional Director, that the Employer's owner-operators are not independent contractors, but are employees within the meaning of Section 2(3) of the Act. The owner-operators, like the company drivers, drive tractors that are leased by the Employer, and they are trained by the Employer and tested on what they have learned. Any driver hired by an owner-operator also must be trained, tested, and approved to drive by the Employer. All drivers are given specific instructions as to the manner in which they are to perform their tasks, including where loading or unloading will take place, when they are to be

[3] *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). See also *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

[4] Sec. 220 (dealing with the definition of a servant) provides:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in the business.

available for loading or unloading, and the time the product must be delivered. The owner-operators are responsible for following the policies and procedures outlined in the Employer's employee manual, are held to certain performance standards, and are subject to the same disciplinary actions as the company drivers.[5]

The owner-operators do not operate independent businesses. They use their tractors, on which they are required to display the Employer's logo, to perform work exclusively for the Employer.[6] In so doing, the owner-operators perform functions that are not merely a "regular" or even an "essential" part of the Employer's normal operations, but are the very core of its business.

In *Roadway*, the owner-operators, found to be employees, devoted a substantial amount, if not all, of their time, labor, and equipment to performing essential functions that allow Slay to compete in the transport of chemicals. Thus, the functions performed by the owner-operators ". . . constitute a regular and essential part of the company's business operations." *Roadway*, supra at 851 (citation omitted). The same reasoning applies here. The owner-operators here transport chemicals solely for *Slay*—a company whose core function is the transportation of such products for its customers. These owner-operators augment the Employer's own driver workforce, performing the same core functions as those drivers.

In contrast, in *Dial-a-Mattress*, heavily relied on by the dissent, the owner-operators, who were found to be independent contractors, did not perform work that was the core of the company's business, which was the marketing and selling of the product. There the owner-operators contracted only to deliver the company's product. Unlike the owner-operators working for Slay (whose tractors must display Slay's logo), the owner-operators in *Dial-a-Mattress* displayed their own company's name, address, and Department of Transportation number on their individual trucks. Also, there is no evidence that the owner-operators driving for Slay own multiple trucks, while several of the *Dial-a-Mattress* owner-operators had more than one vehicle performing deliveries for the employer, thus increasing their potential for entrepreneurial gain.[7] Further, while the owner-operators in *Dial-a-Mattress* could submit contract proposals or try to negotiate special pay deals for their individual companies, that is not the situation in this case.

The Employer's owner-operators do not have a significant entrepreneurial opportunity for financial gain or loss. The Employer establishes and controls the rate of compensation, which is based on the rates applicable to company drivers as set forth in the master agreement between the Employer and the Union, as well as the rates the Employer charges to its customers. Such a compensation arrangement leaves little room for the owner-operators to increase their income through their own efforts or ingenuity. Thus, as noted, there is no evidence that any of them use multiple trucks or that they negotiate special deals with the Employer. Further, despite the fact that an owner-operator may hire a driver to operate the tractor he leases to the Employer, the owner-operator can only negotiate that driver's wages within the compensation rate set by the Employer. See *Roadway*, supra; *R. W. Bozel Transfer, Inc.*, 304 NLRB 200 (1991).[8]

As is usually the case, not all of the record evidence favors a finding of employee status. Here, for example, the owner-operators have the ability to hire drivers, even though those drivers must be trained, tested, and approved by the Employer. However, despite this theoretical potential for entrepreneurial opportunity, the control exercised by the Employer over the other aspects of its relationship with the owner-operators severely circumscribes such opportunity. In reality, there is little economic independence realized by the owner-operators. Thus, there has been no demonstration that this ability has resulted in true economic gain, or even the chance for such gain.

Having considered *all* of the incidents of the owner-operators' relationship with the Employer, we find that the various factors of the common law agency test weigh heavily in favor of employee status for the petitioned-for owner-operators. Thus, the Employer controls the manner and means by which the owner-operators perform their work through its training, testing, dispatch operation and procedures. Further, the Employer controls the compensation the owner-operators receive, and sharply limits their entrepreneurial opportunities, by requiring that each individual who leases a tractor to the Employer enter into a contractual agreement which sets forth specific compensation rates for the type of work that the tractor will be used to perform (either by the owner-operators themselves or by drivers they hire and compensate directly).

Accordingly, contrary to the Regional Director, we conclude that the owner-operators are not independent con-

[5] In an example of "discipline" administered to an owner-operator, Terminal Manager King testified that he had suspended one owner-operator from dispatch for 3 days. The record does not provide any information as to what provoked the suspension.

[6] The Employer maintains that "when drivers are operating under Slay's authority, they must drive exclusively for Slay." While it is unclear from the record whether the lease specifically prohibits a driver from driving for anyone else while under contract with Slay, there is no evidence that any current owner-operator has done so.

[7] In *Dial-a-Mattress*, the record showed that one owner-operator owned 10 trucks; two others each owned 6 trucks; another two owned 3 trucks each; six more owned 2 trucks each; and three owner-operators owned 1 truck and 1 van each which were used for mattress deliveries.

[8] This lack of pursuit of outside business activity may be less a reflection of entrepreneurial choice by the Employer's owner-operators and more a matter of the obstacles created by their relationship with the Employer. See *Roadway*, supra; *C.C. Eastern v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995), denying enf. and vacating 313 NLRB 632 (1994), where the court agreed with the principle that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors."

tractors, but rather are employees within the meaning of Section 2(3) of the Act

ORDER

The Regional Director's Decision and Direction of Election is reversed with respect to the issue on review. The case is remanded to the Regional Director for further proceedings consistent with this Decision.

MEMBER BRAME, dissenting.

The Regional Director found that the Employer's owner-operators are independent contractors, and thus are not employees within the meaning of Section 2(2) of the Act. This finding is solidly grounded on the record evidence and on established precedent, and I would adopt it. Accordingly, I dissent from the majority's decision reversing the Regional Director.

Facts

The Employer transports hazardous and nonhazardous chemicals in liquid and dry bulk form from its facility in Houston, Texas. The Employer contracts with 71 owner-operator drivers for the purpose of providing these transportation services.[1] The Employer leases the tractors used at the Houston facility from the owner-operators pursuant to individual lease agreements which specify the particular tractor being leased and the compensation arrangement. The Employer also contracts with the owner-operators to transport loads to its customers. These agreements contain varying compensation arrangements: by the hour or by the load for local runs and by the mile (with additional payments for detention or demurrage time) for over-the-road runs.

The Employer has no ownership interest in the tractors driven by the owner-operators and is not responsible for their maintenance, repair, fuel, licensing, or operating expenses.[2] The Employer does provide the chemical tank trailers used by the owner-operators and is responsible for their maintenance. All leased owner-operator equipment carries the Employer's logo. However, the owner-operators are responsible for maintaining the necessary insurance and DOT and ICC licensing requirements for the equipment they lease to the Employer.

Owner-operators are required to complete the same Employer training required of Company drivers, which involves safety, government regulations, product identification and general company orientation. Upon satisfactory completion of this program, the owner-operators are issued safety gear and equipment. All drivers are subject to the same company drug testing program and DOT regulations. Drivers are not required to wear uniforms, although the Employer issues them to company drivers and owner-operators on request.

Owner-operators do not receive vacation, sick pay, or medical benefits from the Employer, but are eligible for the Employer's "driver of the year" award. The Employer offers insurance packages to owner-operators but they are responsible for paying for the insurance. For tax purposes, owner-operators are issued Form 1099s rather than W-2 forms and are treated as self-employed persons. In contrast, company drivers do receive vacation and medical benefits.

All drivers operate under the same dispatch system and report to the same dispatchers for their assignments. The dispatch includes such details as: the equipment the driver is assigned to operate, where the driver is to load or unload the product, when the driver has to be available for loading or unloading, and the time the driver has to make the delivery. Owner-operators, like company drivers, may refuse job assignments. Although an owner-operator who refuses a job goes to the bottom of the job assignment board, there is no evidence that they forfeit their contract with the Employer. If no driver accepts a run, dispatch can "force out" the driver.

All drivers are required to comply with the policies and procedures set forth in the Employer's driver manual and are held to the same performance, safety, and attendance standards. Company drivers are subject to discipline for violations of these standards.[3] With regard to owner-operators, while the record shows that Manager King imposed a 3-day suspension from dispatch on an owner-operator, no evidence was presented concerning the date, circumstances, or details of this incident. There is no record evidence of any other "discipline" of owner-operators.

Owner-operators may hire other drivers to drive their tractors. While the Employer must approve the individual selected by the owner-operator and requires that they complete the Employer's driver training program, the Employer does not control the wage rate or other terms and conditions of employment for such drivers.

The Majority's Decision

In finding, contrary to the Regional Director, that the owner-operators are employees, the majority asserts that they do not operate independent businesses but instead use (their own) tractors to perform work "exclusively" for the Employer by transporting chemicals in the Employer's trailers. According to the majority, it is "not clear" whether the owner-operators are permitted to work for other employers but that in any event, none currently do so. The majority claims that the Employer controls the manner and means by which the owner-operators perform their work, in that the Employer trains the drivers, specifies the time and place of delivery, and has disciplined owner-operators who violate its policies. The majority also concludes, contrary to the Regional Director, that the owner-operators do not have a significant opportunity for financial gain or

[1] The Employer also employs 38 company drivers whose status is not in dispute.

[2] Company drivers, in contrast, receive gas cards from the Employer.

[3] The driver's manual was not introduced into evidence.

losses because the Employer controls the rate of compensation. The majority also notes that, in practice, the owner-operators do not pursue other business interests or hire other drivers. According to the majority, these choices are the consequence of obstacles imposed by their relationship with the Employer.

Discussion

In determining whether an individual is an independent contractor or an employee under Section 2(3) of the Act, the Board applies the common-law agency test and considers all of the incidents of the individual's relationship to the employing entity. *Roadway Package System,* 326 NLRB 842 (1998).[4] Accord: *AmeriHealth Inc./Amerihealth HMO,* 329 NLRB 870 (1999). Factors to be considered include the following:

> (1) The extent of the employing entity's control over the details of the work.
>
> (2) Whether or not the individual is engaged in a distinct occupation or business.
>
> (3) The kind of occupation, including whether, in the locality in question, the work is usually done under an employer's direction or by a specialist without supervision.
>
> (4)The skill required in the particular occupation.
>
> (5) Whether the employer or the individual supplies the instrumentalities, tools, and the place of work.
>
> (6) The length of time for which the person is employed.
>
> (7) The method of payment, whether by the time or by the job.
>
> (8) Whether or not the work is part of the employing entity's regular business.
>
> (9) Whether or not the parties believe they are creating an employment relationship.
>
> (10) Whether or not the principal is in the business.

Roadway, supra at 849–850 fn. 32; see also Restatement (2d) of Agency § 220.

Applying the foregoing standards, it is evident that the owner-operators in this case are independent contractors. They transport hazardous chemicals for the Employer using their own tractors, which are licensed and insured by the owner-operators in their own name, not in the name of the Employer. The owner-operators are free to hire other drivers to operate their tractors and to set the drivers' rate of pay. They are also free to work for other employers and to refuse a job without losing their contract. There is no evidence that the Employer controls the particular route used by an owner-operator in making a delivery. In addition, the Employer treats the owner-operators as independent contractors, in that they do not receive fringe benefits and are issued Form 1099s for tax purposes. Nor are they required to wear company uniforms.

In *Dial-A-Mattress,* 326 NLRB 884 (1998), the Board found on comparable facts that the disputed owner-operators were independent contractors. The drivers there delivered mattresses for the employer pursuant to agreements specifying a flat rate for each delivery. The owner-operators were solely responsible for the acquisition, financing, maintenance, and ownership of their vehicles, and for obtaining the appropriate DOT licensing. They could use their trucks for other purposes and hire employees to drive for them without the employer's prior approval. The owner-operators were issued IRS Form 1099s, not W-2 forms, and did not receive any fringe benefits. They were not required to wear company uniforms.

The majority's purported grounds for distinguishing *Dial-A-Mattress* are wholly unpersuasive. The majority states that the Employer controls the manner and means by which the owner-operators perform their work because they receive specific dispatch instructions including where loading will take place, the time to be available for loading or unloading, and the time of delivery. However, in *Dial-A-Mattress,* the company arranged the delivery with its customers and company dispatchers provided a "suggested efficient sequence" of deliveries specifying, inter alia, the time of delivery. Owner-operators were not penalized for late deliveries if they followed the "suggested" sequence; if they departed from the sequence they were subject to such penalties.[5] These directives were not found to be evidence of employer control over the means of performing the work in *Dial-A-Mattress,* and the majority offers no persuasive justification for finding otherwise in this case.[6]

The majority's finding that the Employer "disciplines" owner-operators for violations of its work rules also

[4] In *Roadway*, the Board found that the employer's drivers were employees based on evidence demonstrating that they do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss.

Roadway, supra, at 851.

[5] *Dial-A-Mattress,* supra at 892. In this regard, the Employer's specification of the place to pick up and deliver loads can hardly be viewed as proof of employee status, as the transportation of cargo between two points is the essence of the contract arrangement. The majority's reliance on this factor suggests that they will find independent contractor status only where a driver is free to pick up and deliver loads at random points chosen by the driver.

[6] In light of the Employer's business, i.e., transporting hazardous and nonhazardous chemicals, it is hardly surprising that it would require its drivers to undergo training before allowing them on the road. Compare *Dial-A-Mattress,* supra at 892 (employer's policy prohibiting all drivers from using drugs, alcohol, or gambling did not negate independent contractor status because based on liability concerns). In any event, even if the Employer's training requirement is evidence that weighs in favor of employee status, it is overcome by the other factors noted herein demonstrating that the owner-operators are independent contractors.

misses the mark. The record contains one incident in which an owner-operator received a 3-day suspension from dispatch. The Regional Director found that this evidence was entitled to little weight in the absence of evidence concerning the reason for the suspension or other surrounding details. The majority reverses this finding without discussion.[7] Even assuming that the record evidence concerning this incident is sufficient to warrant its consideration, the Board in *Dial-A-Mattress* found that the company's imposition of similar suspensions in that case did not preclude a finding that the drivers there were owner-operators.[8]

The majority also deprecates significant evidence establishing the independence of the owner-operators. Thus, as noted above, the owner-operators own their own tractors and are solely responsible for their purchase, financing, maintenance, and insurance. The Board has recognized that "truck ownership can suggest independent contractor status where, for example, an entrepreneur with a truck puts it to use serving his or another business' customers."[9] The majority also neglects the fact that the owner-operators are responsible for obtaining the requisite government licenses for the operation of the tractors, including DOT and ICC permits. As in *Dial-A-Mattress,* these facts support a finding of independent contractor status in this case.[10]

Likewise, the majority ignores substantial evidence that the parties have treated the owner-operators as independent contractors. As noted above, the owner-operators, unlike the company drivers, receive no fringe benefits and are issued Form 1099s for tax purposes. The Board in *Dial-A-Mattress* found that these same facts supported a finding of independent contractor status.[11] The majority provides no persuasive justification for ignoring them in this case.

There is absolutely no basis for the majority's conclusion that the owner-operators are precluded from pursuing outside business interests or from reaping entrepreneurial financial gain or loss by obstacles imposed by their relationship with the Employer. In reaching this conclusion, the majority relies on *Roadway,* supra. However, that case is clearly distinguishable. In *Roadway,* the employer used owner-operators as part of its parcel delivery system. Through a variety of financial incentives, including the provision of financing to owner-operators who purchased "approved" vehicles, the employer virtually insured that the owner-operators would own Roadway vans of a specified type. Further, the employer prohibited the owner-operators from conducting outside business during the day and required them to leave the vehicles at the employer's terminal overnight if they wished to have them loaded by the employer's package handlers.[12] These requirements saddled the owner-operators with limited use vehicles and effectively prevented them from engaging in any outside business using their vehicle. The employer also effectively suppressed any potential for entrepreneurial profit through a system of maximum and minimum number of packages and customer stops. No evidence of this character is present in this case.

Conclusion

For the foregoing reasons, I would affirm the Regional Director's finding that the Employer's owner-operators are independent contractors and, hence, are not employees under the Act.

[7] But see *Elmhurst Extended Care,* 329 NLRB 535 (1999) (majority rejects undisputed evidence of effective recommendation that nursing aide's probationary period be extended because "no explanation was offered regarding the basis for or length of the extension").

[8] *Dial-A-Mattress,* supra at 893.

[9] *Roadway,* supra at 851.

[10] *Dial-A-Mattress,* supra at 891. While it is true that the Employer owns and maintains the chemical tank trailers used for deliveries, this would appear to be due to the nature of the cargo to be transported, i.e., chemicals, often hazardous chemicals. The tractors (owned by the owner-operators) can be used with many types of trailers, and where, as here, the products are specialized, it would be impractical (and limiting) for owner-operators to provide their own trailers.

[11] As in *Dial-A-Mattress,* supra at 892, the owner-operators are not required to wear company uniforms.

[12] *Roadway*, supra at 851.